



INTERIOR BOARD OF INDIAN APPEALS

Executive Committee of the Elem Indian Colony v. Sacramento Area Director,
Bureau of Indian Affairs

26 IBIA 193 (08/15/1994)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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EXECUTIVE COMMITTEE OF THE	:	Order Affirming Decision
ELEM INDIAN COLONY,	:	
Appellant	:	
	:	
v.	:	Docket No. IBIA 94-71-A
	:	
SACRAMENTO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	August 15, 1994

Appellant Executive Committee of the Elem Indian Colony seeks review of a February 3, 1994, decision of the Sacramento Area Director, Bureau of Indian Affairs (BIA; Area Director), declining to recognize the attempted recall of the Tribal Chairperson. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

On November 6, 1993, a meeting of the General Council of the Colony was convened to consider the recall of the Chairperson and the Secretary/ Treasurer. Following the recall votes, the General Council also addressed other business not directly related to the recall.

There is no dispute that there are 76 voting members of the Colony, that 42 members signed in at the November 6 meeting (appellant states that an additional member arrived late, although this member apparently did not sign in), or that the meeting was properly convened and called to order by the Chairperson. It appears, however, that when recall of the Chairperson was raised, the meeting was disrupted. Appellant states that the Chairperson and 12 of his family members and supporters left the meeting. When order was restored and the meeting was resumed with the Vice-Chairperson presiding, a vote was taken on recall. The reported vote count concerning recall of the Chairperson was 28 for, 0 against, and 15 abstaining; while that for recall of the Secretary/Treasurer was 1 for, 27 against, and 15 abstaining.

By letter dated November 16, 1993, the Superintendent of the Central California Agency, BIA, declined to recognize the attempted recall of the Chairperson. Appellant sought review of this decision by the Area Director, who issued the decision under review on February 3, 1994. The decision states:

Included with your appeal was a list of 76 qualified voters of the Elem Indian Colony. Article IV, Section 2 of the Constitution and Bylaws for the Elem Indian Colony, as amended, sets forth in part the following quorum requirement: "Forty-five percent (45%) of the qualified voters of the band constitutes a

quorum at meetings of the general council." Based upon 76 qualified voters, 35 general council members constitute a quorum.

In reference to recall actions, the required participation is specified under Article VI, Section 2, as follows: "A majority of those who participate in such election must favor recall in order for it to become effective, provided those who vote constitute at least fifty-one (51%) of the qualified voters." In view of this provision, at least 39 general council members need to participate and vote to validly meet the recall requirement. * * *

In your appeal you * * * indicate that during the process of the meeting the Chairperson declared the meeting invalid and departed with 12 of his family members and supporters. In addition, your letter to the Superintendent dated November 22, 1993 reveals that 14 individuals although present at the meeting refused to vote. These were counted as abstentions.

If the individuals did not actually vote for, against, or abstain, their inaction or departure should not be counted since Article VI, Section 2, of the Constitution requires participation by voting. The remaining number of members who voted does not constitute at least fifty-one percent (51%) of the qualified voters for valid recall actions, nor do they constitute at least forty-five percent (45%) of the qualified voters for a quorum for a general council meeting. Based on the foregoing, your appeal of the Central California Agency's November 16, 1993 decision is denied.

Appellant appealed this decision to the Board. Only appellant filed a brief. After the Board had begun consideration of this case, appellant submitted minutes of a General Council meeting held on July 23, 1994, at which the minutes of the November 6, 1993, meeting were read and approved. A memorandum transmitting the minutes states: "By this action, the Tribe is certifying the results of that [the November 6, 1993] meeting."

The Area Director based his decision that at least 51 percent of the qualified voters must vote in a recall election on Article VI, section 2, of the Colony's Constitution, which provides:

Upon receipt by the executive committee of a valid petition, signed by at least thirty percent (30%) of the qualified voters calling for the recall of an elected officer, the executive committee shall call and conduct within thirty (30) days a recall election. A majority of those who participate in such election must favor recall in order for it to become effective, provided those who vote constitute at least fifty-one percent (51%) of the qualified voters.

Appellant objects that the Area Director has set up an artificial distinction "between the act of abstaining and a verbal confirmation of the act of abstaining" (Opening Brief at 3).

In contrast to the very specific requirement of Article VI, section 2, that “those who vote” in a recall election must constitute at least 51 percent of the qualified voters, Article IV, section 2, provides that a quorum for regular general council meetings is 45 percent of the qualified voters, but establishes no voting requirement. These different requirements must have meaning. The Board holds that the Area Director’s interpretation of Article VI, section 2, as requiring actual voting by at least 51 percent of the qualified voters is a reasonable interpretation of the constitutional provision.

The question remains, however, of whether people abstaining should be counted as part of “those who vote” within the meaning of Article VI, section 2. Under Article III, section 3, of the Constitution, elections for the General Council are by secret ballot. In a secret ballot, the vote is tallied based on the votes actually cast. A person abstaining in a secret ballot must still cast a ballot; the mere failure of a qualified voter to vote does not count as an abstention. Although not clear, it appears that the recall vote here was not conducted by a secret ballot, but instead was a voice vote. The failure to use a secret ballot, as required in other election matters, accounts for at least part of the controversy here.

In any case, appellant bears the burden of proving the error in the Area Director’s decision. Here, appellant asserts that it is not uncommon for General Council members to stand immediately outside the door of the meeting room during council meetings, and that members standing in that location are customarily allowed to vote. It further alleges that when 13 individuals left the recall meeting, at least some of them continued to stand outside the door, making it unclear that they actually intended not to continue their participation in the meeting and recall vote.

In essence, appellant asserts that individuals who left a meeting and did not actually vote on the issue that occasioned their departure should still be counted as participating in the vote. The Board cannot accept this argument under the Colony’s Constitution. Article VI, section 2, is very explicit in mandating that “those who vote” in a recall election must constitute at least 51 percent of the qualified voters. In the absence of proof from appellant that the 15 individuals who were counted as abstaining actually indicated that they were abstaining, thus showing their actual participation in the recall vote, only those persons voting for or against recall can be counted as voting. This distinction was not created by the Area Director, but rather by the Colony’s Constitution. Here, only 28 persons voted in such a way as to be counted. Because 28 persons is not 51 percent of the qualified voters, the Board affirms the Area Director’s decision not to accept the results of the recall election.

Finding that a quorum for regular business had also been lost with the departure of 13 qualified voters, the Area Director further determined not to recognize new business conducted after the recall election. The Board agrees. Business conducted after the recall election had not been raised prior to the departure of 13 qualified voters. A presiding official is under at least some obligation to be aware of the possible loss of a quorum. Even

if there had been a question earlier, after the recall vote the presiding official was on notice that those persons actually voting did not constitute a quorum. Under these circumstances, the presiding official should have determined whether a quorum still existed before proceeding to new business.

Therefore, the Board also affirms the Area Director's decision not to recognize other business conducted at the meeting.

Finally, the later approval of the minutes for the November 6, 1993, meeting, even by a vote of 39 qualified voters, cannot retroactively validate actions that were improper at the time they were taken. In order to "validate" those actions, the actions must be raised again and properly addressed.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CTR 4.1, the February 3, 1994, decision of the Sacramento Area Director is affirmed.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Anita Vogt
Administrative Judge